

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KAREN ROLES)	
Claimant)	
VS.)	
)	Docket No. 270,077
THE BOEING COMPANY)	
Respondent)	
AND)	
)	
INSURANCE COMPANY)	
STATE OF PENNSYLVANIA)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appealed the February 21, 2003 preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish.

ISSUES

This claim returns to the Board for a second time on appeal from a preliminary hearing order. In an Order dated October 31, 2002, the Board determined that claimant had sustained a new and separate injury caused by her exposure to chemicals and contaminants at work. In reaching that conclusion, the Board determined that claimant's ongoing symptoms were not the natural consequence of an earlier injury that had been settled in February 1995. In a 10-page decision containing detailed findings and conclusions, the Board wrote, in part:

4. The Board concludes that the greater weight of the credible evidence contained in the preliminary hearing record proves that claimant's vocal cord dysfunction is a new and separate injury caused by claimant's exposure to chemicals and contaminants *[sic]* in the workplace and not the natural consequence of the January 1, 1991, accidental injury settled on February 22, 1995.

5. After claimant returned to work in 1996, her asthma condition had improved and continued to be stable until she was again exposed to chemicals and other contaminants *[sic]* in 1997. In the latter part of 2000, respondent transferred claimant to IPB-1 which was not air conditioned and exposed claimant to more

chemical[s] and contaminants *[sic]* which caused her vocal cord dysfunction and further aggravated her preexisting asthma condition and made it worse. By working claimant in an environment that included chemicals and other contaminants, and was not air conditioned, respondent violated restrictions imposed on claimant. Those restrictions were clearly identified on respondent's own Active Medical Recommendations/Qualifications sheets. Both Dr. Doornbos and Dr. Loeffler opined that claimant's asthma condition had been aggravated by her ongoing exposure to chemicals and other contaminants *[sic]* in her work environment while employed by the respondent.

6. . . . Here, the preliminary hearing record establishes that claimant's preexisting asthma condition was aggravated and worsened as claimant was exposed to chemicals and contaminants *[sic]* in the workplace and such aggravation constitutes a new injury under the Workers Compensation Act.¹

Consequently, the Board determined that claimant had sustained an accidental injury that arose out of and in the course of employment and the Board found that claimant was entitled to receive medical benefits and temporary total disability benefits.

Respondent and its insurance carrier requested a hearing asking the Judge to terminate claimant's temporary total disability benefits. That hearing was held on February 20, 2003, which resulted in the February 21, 2003 Order in which the Judge denied respondent and its insurance carrier's request.

In the appeal now before this Board, respondent and its insurance carrier contend Judge Frobish erred by failing to terminate claimant's temporary total disability benefits. In their brief to the Board, respondent and its insurance carrier argue that claimant's current medical condition is related to a July 2002 automobile accident. They also argue that claimant's medical condition is permanent, not temporary. Accordingly, respondent and its insurance carrier request the Board to reverse the February 21, 2003 preliminary hearing Order and terminate claimant's temporary total disability benefits.

Conversely, claimant argues that in its earlier order the Board determined the issues of causation and compensability and that respondent and its insurance carrier are trying to appeal the same issues as before. Moreover, claimant argues that her condition has worsened and that she needs ongoing oxygen therapy. Accordingly, claimant contends she has not reached maximum medical improvement and, therefore, the Judge properly denied the request to terminate her temporary total disability benefits.

¹ Order (Oct. 31, 2002) at 8-9.

The only issue before the Board on this appeal is whether the Judge erred by failing to terminate claimant's temporary total disability benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the Board finds and concludes the February 21, 2003 preliminary hearing Order should be affirmed.

As determined in the Board's October 31, 2002 Order, this claim is compensable under the Workers Compensation Act. No new expert medical opinion was presented at the February 20, 2003 hearing to challenge that conclusion.

Respondent and its insurance carrier's principal argument in this appeal is that claimant should not receive temporary total disability benefits as her condition should be considered to be permanent rather than temporary. That issue, however, is not subject to review from a preliminary hearing order.

The Act restricts the Board's jurisdiction to review preliminary hearing findings. Consequently, at this stage of the claim not every alleged error is subject to review. Generally, the Board can review preliminary hearing orders in which an administrative law judge has exceeded his or her jurisdiction.² Moreover, the Board has specific authority to review the preliminary hearing issues listed in K.S.A. 44-534a, which are:

- (1) did the worker sustain an accidental injury,
- (2) did the injury arise out of and in the course of employment,
- (3) did the worker provide the employer with timely notice and with timely written claim, and
- (4) do certain other defenses apply.

The term "certain defenses" refers to defenses that dispute the compensability of the injury under the Workers Compensation Act.³

The issues of whether a worker needs ongoing medical treatment or of whether the worker satisfies the definition of being temporarily and totally disabled are not jurisdictional

² K.S.A. 2002 Supp. 44-551(b)(2)(A).

³ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

issues listed in K.S.A. 44-534a that are subject to review from a preliminary hearing order. Conversely, those issues involve questions of law and fact over which an administrative law judge has the jurisdiction to determine at a preliminary hearing.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.⁴

Respondent and its insurance carrier's argument that the Judge exceeded his jurisdiction by awarding temporary total disability benefits without appropriate medical evidence is without merit. Temporary total disability benefits can be awarded on a worker's testimony alone.⁵

Finally, respondent and its insurance carrier argue that claimant sustained a superseding automobile accident that is responsible for her present need for medical treatment. Although respondent and its insurance carrier introduced a medical note dated August 2002 that indicates that in late July 2002 claimant was involved in an automobile accident, there is no medical opinion in the record that such incident is responsible for claimant's present need for medical treatment for her breathing difficulties.

The Board adopts the findings and conclusions both in its October 31, 2002 Order and its November 22, 2002 Nunc Pro Tunc Order.

As provided by the Act, preliminary hearing findings are not final but subject to modification upon a full hearing of the claim.⁶

WHEREFORE, the Board affirms the February 21, 2003 Order entered by Judge Frobish.

IT IS SO ORDERED.

Dated this ____ day of May 2003.

BOARD MEMBER

⁴ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

⁵ See *Overstreet v. Mid-West Conveyor Co., Inc.*, 26 Kan. App. 2d 586, 587, 994 P.2d 639 (1999).

⁶ K.S.A. 44-534a.

KAREN ROLES

DOCKET NO. 270,077

c: Michael L. Snider, Attorney for Claimant
Kim R. Martens, Attorney for Respondent and its Insurance Carrier
Jon L. Frobish, Administrative Law Judge
Director, Division of Workers Compensation